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William Hubbard

M. Todd Henderson

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## DO JUDGES FOLLOW THE LAW? AN EMPIRICAL TEST OF CONGRESSIONAL CONTROL OVER JUDICIAL BEHAVIOR

*M. Todd Henderson & William H.J. Hubbard*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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## Do Judges Follow the Law? An Empirical Test of Congressional Control over Judicial Behavior

M. Todd Henderson & William H.J. Hubbard<sup>†</sup>

### ABSTRACT

Do judges follow the law? In a naïve model of judging, Congress writes statutes, which courts know about and then slavishly apply. Although interpretation differences could explain deviation between congressional will and the law as applied, in this model there should be no divergence where the law is unambiguous. Section 21D(c)(1) of the Securities Exchange Act is such a clear law: it requires courts to certify attorneys complied with Rule 11(b) of the Federal Rules of Civil Procedure, which forbids frivolous or unsupported claims, in *every* case arising under the Act. In this paper, we provide data that rejects the naïve model: courts make the required findings in less than 14 percent of cases in which such findings were *required* by law. This suggests judges either do not know of the law or, if they do, fail to follow it. We also show that required Rule 11(b) findings about sanctions are made overwhelmingly in cases where sanctions would be least likely – that is, in orders approving settlements – and such findings are extremely rare in cases where sanctions would otherwise be more likely – that is, where motions to dismiss are granted. To explain this seeming paradox, we offer an account that highlights crucial ways in which the incentives of the judge and of the attorneys may interact in complex cases.

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<sup>†</sup> M. Todd Henderson is the Professor of Law and Aaron Director Teaching Scholar at the University of Chicago Law School. William H. J. Hubbard is an Assistant Professor of Law at the University of Chicago Law School. We thank the Coase-Sandor Institute for Law & Economics for generous research support, we thank Charles Zhang and Wooju Lee for invaluable research assistance, and we thank Tom Miles for sharing data on judicial characteristics.

## 1. INTRODUCTION

In our governmental system, the three branches exert control over each other in a variety of direct and indirect ways, many of which are built into the constitutional system. For instance, Congress uses its purse-string power and ability to hold hearings to influence executive branch actions. When it comes to controlling judges, however, the options are more limited. Once “inferior” courts are created, the Constitution forbids Congress to alter the terms of employment of federal judges.<sup>1</sup> With the most straightforward option foreclosed by the Constitution, Congress must rely on other approaches. So how does Congress get judges to act the way it wants?

Most obviously, Congress can change the substance of the law.<sup>2</sup> When Congress changes the elements of a cause of action this is a command to courts to act in a particular way. But Congress cannot force courts to do anything directly, including requiring that judges know the law and follow it. While we have no doubt judges want to do both of these things more or less, the intensity of this desire is likely to vary by judge and by issue. As such, we hypothesize that any legal change will work only imperfectly. For instance, in this paper, we study a congressional command for judges to make particular findings in *every* securities case, but find they do in less than 14 percent of cases.

In the absence of direct methods of control, Congress must rely on indirect mechanisms. In many situations, Congress can rely on the parties to the litigation to educate judges and press for enforcement of statutory commands. This is likely in the case of the substantive legal changes. For instance, if Congress requires that misrepresentations be deliberate, rather than negligent, for damages to be awarded in securities fraud cases, it can reasonably assume that a defendant will have strong incentive to ensure the statute is enforced. Thus, even if the trial court ignored the law, either out of ignorance or defiance, Congress could be fairly sure the defendant would raise the issue on appeal.<sup>3</sup> In

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<sup>1</sup> Article III, Section 1.

<sup>2</sup> Congress can hold hearings or publicize information about judicial activities, but this is likely limited to issues that are relatively easy to measure, such as docket management. For instance, Congress has published data on court speed and efficiency in the so-called Biden Reports, and there is anecdotal evidence this is an effective mechanism of control on this issue.

<sup>3</sup> The appellate judges are also only imperfect agents of Congress, but adding three or twelve more judges would, all else being equal, increase the probability of compliance.

short, the parties with a stake in the new substantive rule will raise the costs of non-compliance by the trial court, thereby increasing the probability of compliance.

Where Congress cannot rely on the parties to vigorously press legal duties on courts, congressional control over courts is likely to be less. We predict the incentives of the judges and the parties to know and follow the law are lower in the case of procedural changes to the law. To see the intuition, consider a hypothetical congressional attempt to require courts to decide cases in particular number of days (e.g., five days). Some judges might know the rule and slavishly apply the law, but others might not if they have interests, such as leisure or seeking “justice,” that outweigh their interests in knowing and following the law (that is, the time constraint). Unlike the case of a substantive change in law, the parties may not try to enforce the congressional command. This may be because a delay may benefit both parties (or both parties’ lawyers), the issue could be resolved as part of a settlement, the lawyers may not want to press the issue for fear of antagonizing the court or the other lawyers, or for a host of other reasons. With no one to complain, the statutory command is more likely to be avoided.

In this paper, we test judicial compliance with a statutory command to make certain findings in every securities case in order to gain some insight into this dynamic. The object of study is section 78u-4(c) of the Private Securities Litigation Reform Act of 1995 (PSLRA),<sup>4</sup> which added section 21D(c) to the Securities Exchange Act of 1934. The PSLRA, which was passed over President Clinton’s veto, was designed to reduce the number of frivolous securities lawsuits filed in federal court. The law introduces several reforms to securities class actions, including changing how lead plaintiffs are selected and the raising pleading standards for fraud. In addition, through section 21D(c), it tries to increase the use of sanctions against attorneys for frivolous actions by

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<sup>4</sup> The PSLRA was passed in response to a perception that much securities litigation was frivolous or filed for nuisance value (Choi 2004). In addition to the changes described in the text, the PSLRA made several changes to the law governing private securities litigation. First, it designates the plaintiff with the largest financial interest as the presumptive “lead plaintiff,” meaning the lawyers will be chosen by parties with economic stakes in the litigation. See Section 27(a)(3), Securities Act; Section 21D(a)(3), Exchange Act. Second, it stays discovery until after a ruling on a motion to dismiss. See Section 27(b), Securities Act; Section 21D(b)(3)(B), Exchange Act. Third, it requires plaintiffs to plead with particularity facts giving rise to a strong inference that defendants acted with scienter in making any alleged misrepresentations. See Securities Act; Section 21D(b)(2), Exchange Act. Fourth, the statute requires courts to review attorney fees for reasonableness. See Section 27(a)(6), Securities Act; Section 21D(a)(6), Exchange Act.

*requiring* the district court, upon “final adjudication”<sup>5</sup> of a case brought under the Exchange Act, to include

in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.<sup>6</sup>

Rule 11(b) requires all papers filed with a court are “not being presented for any improper purpose,” that all claims “are warranted by existing law or by a nonfrivolous argument for extending . . . existing law,” and that “the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for . . . discovery.” If the court finds that Rule 11 has been violated, the PSLRA mandates the imposition of sanctions and creates a rebuttable presumption that the appropriate sanction is the award of attorneys’ fees and costs.<sup>7</sup>

The most unusual and most interesting feature of section 21D(c)(1) is that explicit Rule 11 findings are *mandatory* in every case decided on the merits or settled. The statute does not rely on the parties to bring sanctions motions against the opposing counsel or merely empower courts to raise issues of sanctions *sua sponte*,<sup>8</sup> as was the case prior to the law, but rather *requires* courts to make specific findings about compliance with Rule 11. This makes section 21D(c)(1) uniquely useful to the empirical study of judicial behavior for two reasons.

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<sup>5</sup> The statute does not define “final adjudication”, but courts define the term to include dismissals or judgments that terminate (with prejudice) proceedings in the district court. *Blaser v. Bessemer Trust Co.*, No. 01 Civ. 11599, 2002 U.S. Dist. LEXIS 19856, at \*1 (S.D.N.Y. Oct. 21, 2002) (voluntary dismissal without prejudice does not trigger obligation); *Dimarco v. Depotech Corp.*, 131 F. Supp. 2d 1185 (S.D. Cal. 2001) (trial verdict triggers command, even if appeal pending). This means that any settlement, dismissal with prejudice (either at the motion to dismiss or summary judgment phase), and verdict must be accompanied by an on-the-record finding regarding Rule 11 compliance.

<sup>6</sup> Section 21D(c)(1), Exchange Act. Rule 11 of the Federal Rules of Civil Procedure is one of the primary procedural mechanism for disciplining attorneys who misuse the federal courts. The current version of the rule prohibits, among other things, lawyers from filing documents with a court that are “presented for any improper purpose.” FRCP 11(b). This includes filing unsupported or frivolous claims for purely nuisance value. If a court, either on its own or after the motion of a party, finds that Rule 11 has been violated, the rule permits (but does not require) the court to “impose an appropriate sanction on [the] attorney.” FRCP 11(c).

<sup>7</sup> See 15 U.S.C. § 21D(c)(1)(3)(A)(ii).

<sup>8</sup> The parties and the court had these powers prior to the statutory change.

First, a statutory mandate that judges act in a certain way is the clearest and most direct way that Congress can attempt to control judicial behavior. Yet, mandates as absolute as section 21D(c)(1) are rare, which suggests that the most obvious method of controlling judicial behavior may not be the most effective. The conventional wisdom among practitioners is that district courts do not routinely comply with the section 21D(c)(1) requirement, and some appellate cases noting the failure of district courts to make the required findings.<sup>9</sup> Therefore section 21D(c)(1) provides an opportunity to explore the determinants of judicial behavior that flouts a congressional command.

Second, such an absolute requirement to make express findings provides a rare opportunity to study judicial behavior free from the usual host of concerns about selection effects that attend to any attempt to study judicial responses to legal change. Most legal rules (whether court-made or legislative) will only affect the behavior of the judge in appropriate cases; for example, a rule setting limits on punitive damages will only affect cases where punitive damages are likely to be high, or a rule raising pleading standards will only affect complaints with sketchy allegations. In such cases, we expect that parties, attorneys, and judges will all alter their behavior in response to the legal rule. This will bias any data set, and therefore confound any potential conclusions from observing the data.

Further, when one studies the effect of judicial characteristics on case outcomes, there is the concern that the mix of cases that reaches any given set of judges is itself a function of those judges' characteristics; for example, parties may settle different cases depending on whether a court tends to be liberal or conservative, expert or not in a particular area, and so on. If so, the comparing case outcomes in, say, a liberal court with case outcomes in a conservative court does not control for potential differences in the composition of cases.

Of course, there are various ways to address these concerns, and in the judicial behavior context, at least, selection effects may not be a first-order problem to begin with.<sup>10</sup> But it is even better to dispense

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<sup>9</sup> For example, in both *Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.* (186 F.3d 157, [2d Cir.1999]) and *Dellastatious v. Williams* (242 F.3d 191 [4th Cir. 2001]), the appeals court noted that the district court failed to making on-the-record findings regarding Rule 11 compliance.

<sup>10</sup> For example, the Priest-Klein model of selection effects in litigation predicts that, in the limit, only cases that are toss-ups are litigated, while the rest of cases settle. If so, then the judicial characteristics of a given court should have no effect; plaintiff win rates should approach 50 percent, regardless of judicial ideology. Given that this selection effect should attenuate any true effects of judicial ideology, then observed correlations between judicial ideology and plaintiff win rates represent *conservative* estimates of the causal relationship.

with selection effects altogether. Section 21D(c)(1) does so, by imposing a blanket requirement for findings regardless of which securities cases get filed, regardless of whether the cases are settled or tried, and even regardless of who prevails.<sup>11</sup> At first blush, at least, neither parties nor judges should be able to avoid the mandates of section 21D(c)(1), so long as the plaintiff files suit and the court has jurisdiction. Thus, empirical analysis of section 21D(c)(1) compliance should have a what-you-see-is-what-you-get property—what appears to be a low response of courts to section 21D(c)(1) *really is* a low response of courts to section 21D(c)(1)!

The simplicity that section 21D(c)(1) offers in terms of causal inference, however, comes at a cost of data complexity. To show non-compliance with the requirement of explicit findings, we must prove a negative: that in a given private securities lawsuit in federal court, the district court judge never made section 21D(c)(1) findings. Reliance on published opinions is inadequate to the task, as the findings may appear in an unpublished order.

To explore the courts' treatment of section 21D(c)(1), therefore, we construct by hand a dataset of PACER docket records of all private securities lawsuits filed in federal court from 1994 to 2008. We conduct textual analysis of these docket sheets and then collect and parse the text of all court orders that could plausibly contain section 21D(c)(1) findings. This process involved the parsing of more than 20,000 docket sheets and more than 7,000 court orders, primarily by automated text analysis but in the final round of review by individual human review. This process so far has resulted in a dataset of over 1,000 cases in which there was sufficient text-searchable docket material to make a determination as to the presence or absence of section 21D(c)(1) findings.

With this dataset, we investigate three aspects of securities litigation under the PSLRA. First, we investigate the extent to which the congressional command in section 21D(c)(1) has led district courts to make Rule 11 findings in *every* securities case. Our findings confirm the conventional wisdom we had gleaned from attorney anecdotes and appellate cases. Courts make section 21D(c)(1) findings infrequently. We observe on-the-record findings regarding Rule 11 compliance in less than 14 percent of all cases.

Second, having rejected the naïve model of judging, we describe an alternative but informal model of judging and litigant behavior that provides a framework for understanding why we observe so little com-

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<sup>11</sup> Presumably, the impetus for the Section 21D(c)(1) requirement was frivolous complaints filed by plaintiffs, but the language of the statute makes no such distinctions. And in at least one case, a court entered Section 21D(c)(1) findings that imposed sanctions on a *defendant* for filing frivolous *answers*.



pliance with the law. This discussion also examines some of the subtle and sophisticated ways in which parties and judges can evade the application of section 21D(c)(1), despite its seemingly comprehensive scope.

Third, we test some of the hypotheses generated by our informal model against the data to identify the determinants of compliance and non-compliance. We find that congressional attempts to direct judicial behavior depend on a complex mix of incentives of the parties and other courts. In this respect, the paper combines elements of two closely related literatures: judicial behavior and litigant behavior.

Our insight helps resolve an apparent paradox we observe in the data described below. Although obligated by law to make findings about the frivolousness of pleadings in every securities case, judges make the required findings mostly in cases where there is the least impetus for a sanction – that is, a proposed settlement agreement that the court approves – and very rarely in cases where there is the most reason for a sanction – that is, an extremely tenuous complaint that is the subject of a motion to dismiss.<sup>12</sup>

Section 2 introduces a suite of hypotheses that organize our thinking about the patterns we might expect to see in compliance with section 21D(c)(1) and the empirical predictions that we can test with the data. Section 3 describes our dataset, and Section 4 presents our empirical results and returns to the accounts of judicial behavior in Section 2 to synthesize them with the data and each other. We present an informal, intuitive account of judge and litigant behavior that explains the observed patterns of limited compliance with the congressional mandate. Section 5 tries to explain how the incentives of the judges and the parties operates in the course of actual cases. Section 6 concludes.

## **2. Hypotheses Regarding Compliance with Section 21D(c)(1)**

In this section, we develop a series of empirical predictions that we can bring to the data. We organize these predictions around several accounts, each of which relies on different, but closely related, assumptions about the nature of judicial behavior.

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<sup>12</sup> Courts rarely makes section 21D(c) findings in these cases because the complaint will get dismissed at least once without prejudice, and the plaintiff at that point can simply decline to refile to avoid further judicial scrutiny. Although technically the court would still be obligated to make findings upon expiration of the period in which the plaintiff can refile, this never happens.

## 2.1 The Perfect Agent Account

The simplest account of how courts might comply with the section 21D(c)(1) requirement is that courts know the law and apply the law perfectly and faithfully to congressional command. While we fully expect the data to reject this account, it serves as a baseline against which to compare competing accounts. A weaker version of this account might predict that although compliance is not perfect and consistent, findings are more likely in cases with weaker merits or a greater likelihood of sanctionable conduct.<sup>13</sup> As an empirical matter, of course, perhaps the hardest characteristic of a lawsuit to measure objectively is its merit. One proxy we use is the level of sanctions activity in a case, but this is likely a weak proxy.<sup>14</sup> To test this account, we examine whether compliance with the rule is routine, and to the extent it is not, whether compliance is correlated with sanctions activity.

Our initial account of court behavior makes three assumptions that more nuanced theories of judicial behavior described below relax: (1) judges are perfectly informed; (2) judges are unconstrained by effort or attention; (3) judges' preferences for the dispositions of cases conform to the principal's policy preferences. Relaxing one or more of these assumptions allows us to generate a set of potentially overlapping accounts of how courts might respond to the congressional mandate in section 21D(c)(1). We discuss several of these accounts below.

## 2.2 Relaxing the Perfect Information Assumption: The Learning Account

One reason why judges may not perfectly apply the law is that they do not know the law. Federal district court judges are generalists, and it is probable that the minutiae of specialty area, like securities law, is beyond the ken of the average judge. A pure learning account would surmise that judges *would* always apply the rule, if only they knew about it. A more "realist" learning account would allow for the possibility of knowing non-compliance with the rule, but would nonetheless predict that compliance with the rule would be an increasing function

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<sup>13</sup> This could be the behavior of a "perfect agent" if the purpose of Section 21D(c)(1) is merely to encourage sanctioning behavior, and in particular *sua sponte* sanctions, by courts.

<sup>14</sup> The filing of motions for sanctions may reflect the aggressiveness of a party's litigation strategy as it reflects the underlying merits of a claim, and which party's litigation strategy upon which it reflects—the moving party or the responding party—is also ambiguous. Thus, sanctions activity appears below in discussions of non-merits-related determinants of Section 21D(c)(1) findings as well.

of exposure to the rule. Judges gain knowledge with experience, either directly from cases they work on, or from cases from other judges in their district, or from other sources.

To test this account, we look for evidence that judges are more likely to make section 21D(c)(1) findings as time passes, as they encounter more post-PSLRA securities cases, either through their own cases or perhaps second-hand through the experience of other judges in their district.

### **2.3 Relaxing the Unlimited Effort Assumption: The Judicial Inertia Account**

Relaxing the assumption that judges have unlimited effort and attention to devote to each case allows us to address the reality that district court judges must dispose of hundreds of cases per year, and thus cannot devote perfect attention to the legal details of any given case. In some ways this account relates to the learning account, as learning takes effort, and thus limitations to judicial attention and effort may manifest themselves in the failure to acquire new information.

It may also manifest itself in the force of habit, for example, as judges appointed before the PSLRA may simply continue to use their pre-PSLRA opinion templates and case management practices in spite of the new requirements of the law. To test this account, in addition to tests described elsewhere, we look at sanctions activity within a lawsuit as a proxy for legal argumentation that may remind or require the judge to make findings.

We also look for differences in compliance rates among judges appointed before and after the effective date of the PSLRA,<sup>15</sup> and we use proxies for judges with diminished energy and involvement in litigation (senior status) and for judges with greater administrative responsibilities and involvement (chief judge status).<sup>16</sup> In this account, senior and chief judge status should both be correlated with lower compliance, as the greater responsibilities of a chief judge may dilute the judge's attention to individual case details.

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<sup>15</sup> For a similar approach in the context of guidelines sentencing, see Yang (2013).

<sup>16</sup> These measures may also be relevant to the learning account, to the extent that senior judges have diminished exposure to new cases, and chief judges have greater exposure to new cases and developments in the district as a whole.

## 2.4 Relaxing the Shared Preferences Assumption: The Judicial Ideology Account

Another way to relax the assumptions of the perfect agent account is to allow for the influence of the judge's policy preferences on the judge's behavior. This is grist for the mill of judicial behavior research, so we will not belabor this concept here. But, as a well-known example from prior research suggests, politics may matter. The PSLRA was a centerpiece of the Republicans Contract with America after they took over Congress in 1994, and opposition to the plaintiffs' bar has continued to be a Republican issue. If we assume that conservative judges are likely to be less sympathetic than liberal judges to plaintiffs in securities lawsuits, and that section 21D(c)(1) more often can be deployed against plaintiffs than defendants, it seems fair to assume that section 21D(c)(1) findings may be employed more often by conservative judges than liberal judges.

To test this account, we rely upon the adjusted common space scores for judicial ideology, which reflect political ideology of the appointing president, adjusted to account for senatorial courtesy by replacing the president's score with the common space score of the judge's home state's senator (if any) of the same party as the appointing president (or the average of both senators if both share the same party as the president).

## 2.5 Introducing Monitoring: The Appellate Oversight Account

Once one relaxes the assumptions underlying the perfect agent account, a principal-agent problem emerges, in which the principal (Congress) may want a mechanism to increase the agent's compliance with the principal's laws.<sup>17</sup> While Congress cannot directly discipline the failure of a district judge to make section 21D(c)(1) findings, the courts of appeals can. As noted above, a number of appellate opinions have noted the failure of the district court to make required findings.<sup>18</sup> If district judges are averse to reversal, then appellate precedent in their circuit acknowledging the section 21D(c)(1) requirement may induce greater compliance with the rule.

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<sup>17</sup> It is worth emphasizing our choice of the verb "may." As we will discuss below, non-compliance with the letter of Section 21D(c)(1) does not necessarily indicate that there has been a failure of the courts to effectuate the ends of the PSLRA.

<sup>18</sup> A full list of appellate cases is found in the Appendix. We found at least 9 cases, from 1999 to 2013, in which appeals courts remanded to district courts to comply with the statutory requirement.

To test this account, we focus on two sets of circuits. First, there are three circuits in which the circuit has remanded a case to the district court to make findings under section 21D(c)(1) after noting a district court's failure to make such findings.<sup>19</sup> We examine whether these circuits display a higher rate of compliance after these opinions than before, relative to circuits with no such appellate discipline.<sup>20</sup>

Second, there are three circuits in which the circuit court has noted that a district court erred by failing to make findings under section 78u-3(c), but did not remand the case, choosing instead to make the necessary findings in the appellate opinion itself.<sup>21</sup> While this second set of circuits, like the first, show a willingness to police compliance with section 21D(c)(1), they also show a willingness to relieve the district courts of the responsibility of making findings if such findings can be made on appeal. Thus, we expect that the effect of appellate precedent in this latter context on compliance with section 21D(c)(1) to be negative, in that it reveals a lack of penalty (in the form of remand) for failure to comply.

## 2.6 Introducing Litigant Strategy: The Role of the Case and the Lawyers

While the focus of this paper, and the conference to which this paper attempts to contribute, is *judicial* behavior, we hypothesize that *litigant* behavior is major determinant of judicial behavior in the context of section 21D(c)(1).<sup>22</sup> Most of the extant literature of judicial behavior, however, has not emphasized the role of litigant behavior. This seems to be due to at least two factors. First, most past studies focus on appellate courts, and in particular the United States Supreme Court. Given the well-defined and narrow scope and nature of appellate review, it is reasonable to presume a diminished role for parties and advocates and a primary role for the court.<sup>23</sup>

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<sup>19</sup> These cases are *Gurary v. Winehouse* (190 F.3d 37 [2d Cir. 1999]), *Morris v. Wachovia Sec., Inc.* (448 F.3d 268 [4th Cir. 2006]), and *Thompson v. RelationServe Media, Inc.* (610 F.3d 628 [11th Cir. 2010]).

<sup>20</sup> All of the problems we've described repeat at the appellate level. There is, of course, another appellate body, the Supreme Court, but we know of no case in which it opined on this statutory requirement. There is also reason to believe that some of the problems we've described may be reduced, simply by virtue of the additional judges involved in appeals, whether it is because they are checks against slacking, sources of information, or other reasons.

<sup>21</sup> [Cites.]

<sup>22</sup> And everywhere else, for that matter.

<sup>23</sup> We suspect, though, that the role of appellate attorneys as agenda-setters is an important one. See, e.g., *Baker and Biglaiser (2013)*; *Mak, Sidman, and Sommer (2013)*.

Second, as a practical matter, data on litigant characteristics and activity is less accessible than data on judicial characteristics and opinions. Until recently, it was essentially inaccessible. Today, though, the expanded coverage of motions and other litigation materials on Westlaw, Bloomberg BNA, and other sites, and the now-universal adoption of PACER by the federal courts make possible datasets that incorporate rich data on both judicial characteristics and litigant behavior.

How might litigant behavior be an important determinant of judicial behavior in the context of this paper? Under the perfect agent account, litigant behavior is essential irrelevant, because section 21D(c)(1) makes Rule 11(b) findings mandatory; the filing of a motion or a request for sanctions is unnecessary. Once we consider that judges may have reasons (for example, informational, effort-based, or ideological) not to make required Rule 11(b) findings, we see that litigant behavior is key. If the litigants do not raise the issue, then the district court need not act, and may not even know they are obligated to act. Litigants may even try to *prevent* court compliance with the statute by hinging settlements on sanctions findings *not being made*. Courts may be reluctant to upset a settlement to comply with the statute, both because it will be more work for the judge, and also because parties forced into arguments about sanctions are unlikely to make them vigorously. Moreover, if the court does not raise the issue over the parties sitting on their rights, there will be no one to make the lack of findings an issue on appeal.

This in turn leads us to an account of litigant behavior. What might determine litigants' willingness to raise the issue of compliance with the need to make findings under section 21D(c)(1)? Higher stakes litigation is correlated with higher litigation costs (Lee and Willging 2010). Since under section 21D(c)(1) an award of attorney fees is the presumptive sanction for a Rule 11 violation, the benefits of pushing for Rule 11 findings go up as the stakes rise. All else equal, therefore, we would expect cases with higher stakes and higher litigation costs to have a greater likelihood of a section 21D(c)(1) finding.

It is also worth noting that much private securities litigation is handled by a limited number of highly sophisticated, highly experienced, repeat players, both on the plaintiffs' and the defendants' side. These repeat play dynamics may affect the willingness of a party (read: the party's attorneys) to push for findings at the end of a case. Which direction this cuts, however, is not clear *a priori*. Sophisticated plaintiffs' attorneys may ensure that pushing for Rule 11 findings will be futile, or they may be able to deter requests for Rule 11 findings with the threat to "punish" the opposing law firm in future cases. On the other hand, the fact that the potentially sanctioned firm is a repeat

player may raise the benefits of seeking Rule 11 findings for the repeat-player defense firm.

To test this account, we look at proxies for the stakes of the case (class action status) and for the expenditures on attorney fees (total number of docket entries). We also proxy for aggressive litigation strategy and litigant emphasis on sanctions by looking at sanctions activity within a lawsuit.

### 3. Data Description and Summary Statistics

Before turning to the task of testing the predictions of these accounts against the data, we briefly describe the data we use. As our goal is to document rates of (non-) compliance with section 21D(c)(1), our data must include a set of finally adjudicated private securities lawsuits and sufficient information about each case to determine whether the required findings have been made. The usual, and easiest, method of gathering judicial opinions from Westlaw or other online sources is, unfortunately, inadequate to this task, as these databases do not capture all district court opinions, orders, and judgments.<sup>24</sup> For this reason, any attempt to rely on these databases will inevitably suffer from a “denominator problem”: no matter how many, or how few, opinions we identify that make section 21D(c)(1) findings, we cannot tell what share of the total these opinions represent. Further, they are likely to disproportionately omit certain types of final adjudication as well, such as settlements and jury verdicts.

For this reason, we gather our data from a source that allows us to gather a comprehensive set of information about private securities cases in federal court, but which also presents its share of complications. We construct by hand a dataset of PACER docket records and court orders in all private securities lawsuits filed in federal court from 1994 to 2008. The data collection and processing is important but complex and detailed, and therefore we describe it in detail in the Appendix.

The collection and processing of the data left us with 1,039 cases for which we were able to gather a complete, text-searchable set of docket records and final orders and judgments, which were candidates to contain section 21D(c)(1) findings. Of these cases, 140, or 13.5 percent, actually had such findings. In 125 of the 140 cases with the required findings, the findings appeared in a court order approving a settlement. Descriptive statistics for this sample appear in Table 1.

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<sup>24</sup> The criteria used for inclusion in these databases are opaque and have varied over time. For the time period that is the subject of our study, the criteria for publication to the Westlaw online database, for example, varied by district, and would depend on a mix of judges marking opinions for publication and Westlaw editors selecting opinions for publication.

## 4. Results

The potential accounts of judicial and litigant behavior outlined above show a large number of factors that could influence judicial behavior in light of the requirements of section 21D(c)(1). In our data, we have direct measures of some factors, such as the timing of appellate decisions on section 21D(c)(1), and proxies for other factors, such as judicial ideology scores and measures of docket activity. Table 2 present the results of a series of logistic regressions that test for the relationships hypothesized in the accounts described in section 2. All results include controls for circuit, and for ease of interpretation, our tables present marginal effects (evaluated at mean values of continuous variables) rather than logit coefficients.<sup>25</sup>

### 4.1 Testing the Perfect Agent Account

The hypothesis that judges are perfect agents in complying with section 21D(c)(1) is easy to reject. The observed compliance rate is under 14 percent. This suggests that judges either do not know the law or do not follow the law except when it is in their interests to do so. In an area as specialized as securities law, it is plausible that generalist judges do not know details, such as section 21D(c), unless the lawyers bring it to their attention. If this is the case, then whether judges follow the law depends entirely on the incentives of the litigants, and mandatory commands *to judges* make less sense.

Moreover, as column (5) of Table 2 indicates, the relationship between sanctions activity (our admittedly poor proxy for weak merits) and section 21D(c)(1) findings is essentially zero. This suggests the merits of the underlying matter are not the only, and perhaps not even a significant, factor in the decision to comply with the law. In other words, as we describe more fully below, the incentives of the parties to raise the issue of a mandatory requirement with the court are not correlated with the behavior of the parties – in fact, as we show, they are likely inversely correlated.

### 4.2 Testing the Learning Account

The learning account—that generalist judges learn about law over time as they get more experience with securities cases—gets some traction. Column (1) of Table 2 presents results in which the right-hand-side variables are limited to measures of the exposure of judge to

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<sup>25</sup> Results without controls for circuit are virtually identical, as are results for regressions using a linear probability model, with one exception as noted below in section 4.5.



post-PSLRA securities cases: are time (in years) since the effective date of the PSLRA; a (logged) count of the post-PSLRA securities cases terminated by the judge up to and including the judge's decision in the current case; and a (logged) count of the past post-PSLRA securities cases terminated in the judge's district up to and including the judge's decision in the current case.<sup>26</sup> The variables attempt to capture opportunities for learning about the rule and the gradual "adoption" of a practice of making section 21D(c)(1) findings over time.

There appears to be increasing compliance with section 21D(c)(1) over time, with a statistically significant increase of close to 2 percentage points in compliance per year (this falls to about 1 percent once the remaining covariates are added). Consistent with the learning account, greater exposure to post-PSLRA securities cases is associated with higher rates of section 21D(c)(1) findings. Judges seem not to be entirely dependent on the parties in every case, since they appear to learn from prior cases or from reading other cases or other sources. These latter relationships are strong in (unreported) bivariate regressions, but are not significant in the combined regression in column (1), likely due to collinearity among them.

### 4.3 Testing the Judicial Inertia Account

The account based on limited judicial effort receives mixed support. Column (2) of Table 2 adds measures of the seniority and experience of the judge: whether the judge was senior status at the time the case was terminated; whether the judge was chief judge of the district at the time the case was terminated; and whether the judge was confirmed after the effective date of the PSLRA.

We find significant and fairly strong evidence senior status matters to compliance. If senior status is a proxy for diminished incentive or ability to exert effort to learn about or comply with section 21D(c)(1), then this would suggest the costs of compliance are a driver of judicial behavior. It is important to note that senior status here is not merely serving as a proxy for age or experience, given that chief judges largely share these qualities, but no such negative relationship exists between chief judge status and section 21D(c)(1) findings.<sup>27</sup> Chief judges and

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<sup>26</sup> Natural logs of the case counts are used because of the highly skewed distribution of values across judges.

<sup>27</sup> Another possible explanation for the senior-status finding is that senior judges end up (through case reassignment processes) with easier cases than full-time judges. If this is true, then the senior-status variable may be instead a measure of case complexity. This result would then support our findings regarding the number of motions filed being positively correlated with statutory compliance.

senior judges are likely of similar age and experience, and yet only senior judges are much less likely to make the required Rule 11(b) findings. This suggests judicial incentives to know and apply the law matter a great deal to compliance with congressional commands.

The remaining variables are small in magnitude and not statistically significant, though they have the predicted sign.

#### **4.4 Testing the Judicial Ideology Account**

Judicial ideology as a factor in compliance with section 21D(c) receives no support from the data. Column (3) of Table 2 adds the judge's adjusted common space score to measure judicial ideology and controls for race and sex of the judge.

Given that sanctions are a freighted concept for most lawyers, and private securities litigation is a subject of political interest (to which the passage of the PSLRA over a presidential veto attests), one might expect that ideology would matter in this context. Given the high-profile nature of many securities class actions and the ideologically charged nature of many of these suits – e.g., pitting union pension funds against corporate management – one might expect it to matter a great deal. But it doesn't. Nonetheless, this null finding is consistent with the observation, noted in Epstein, Landes, and Posner (2013, pp. 231–37), that the effect of ideology weakens as one moves down the appellate chain from the Supreme Court to the district courts. Further, given the explicit text of the PSLRA, the meaning of the requirement for findings on compliance with Rule 11 is not likely the subject of debate, no matter a judge's ideology.

#### **4.5 Testing the Appellate Oversight Account**

The data suggest that appellate oversight affects the rates of compliance among district court judges. Column (4) of Table 2 adds indicator variables for whether, at the time the case was terminated, there existed in the circuit appellate precedent in which the circuit court remanded a case to the district court for failure to make section 21D(c)(1) findings ("Precedent: Remand") or, after concluding that the district court failed to make the required finding, made the required findings itself without remand to the district court ("Precedent: No Remand"). While the first type of precedent might incentivize district courts to make findings, the latter type of precedent may have the opposite effect, by indicating to district judges that the circuit court will simply make the findings for them.

This latter effect appears to be large and statistically significant in the data. In circuits where the appellate court is willing to make find-

ings rather than forcing the district court to do so, it appears that appellate oversight actually *reduces* district court compliance. This prompts one to wonder whether the mechanism by which appellate review disciplines district courts is not the reputational harm of reversal (for which we find no evidence of an effect) but rather through a reversal *and remand* imposing direct costs in time and effort on the district judge.

The former effect is small and not statistically significant, and shows considerable sensitivity to variations in the sample scope or use of a linear probability model. Thus, this result should be interpreted with caution.

#### 4.6 Testing the Role of the Litigant Behavior

Litigant behavior appears to be a major explanatory factor of compliance with the law. Column (5) of Table 2 adds measures of the extent and intensity of litigation activity in the case: a dummy variable for cases in which “class action” or “class certification” appear in the docket sheet, indicating a putative class action; a (logged) count of the number of docket entries in the docket sheet; and a (logged) count of the number of times the stem “sanction!” appears in the docket sheet.<sup>28</sup>

The coefficient on docket entries is large and highly statistically significant. Because the counts are logged, the coefficient of 0.066 for docket entries roughly means that a doubling of the number of docket entries is associated with a 6 percentage point increase (relative to a baseline rate of 13.5 percent) in the likelihood of findings, which is a very strong relationship given that the range of the number of docket entries in a case spans several orders of magnitude. While the class action indicator is significant in a bivariate regression, it is not significant when the number of docket entries is included as a covariate, which suggests that the class action indicator and the measure of docket activity are both proxies for the same thing, which we interpret to be the volume of litigation activity in a case. Thus, bigger, longer, or more complex cases are more likely to have Rule 11(b) findings required by section 21D(c)(1).

Interestingly, though, the most obvious explanation—that in big cases, litigants have an incentive to push for section 21D(c)(1) sanctions—does not suffice. As column (5) of Table 2 indicates, our measure of sanctions activity is essentially uncorrelated with section 21D(c) findings. Indeed, the vast majority of section 21D(c)(1) findings (125 out of 140) appear in the context of court approval of a proposed set-

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<sup>28</sup> We use the natural log of the docket entry and sanction activity variables to account for their highly skewed (and indeed approximately lognormal) distributions.

tlement order that contains boilerplate language finding no Rule 11 violations.<sup>29</sup> Yet most orders granting with prejudice a motion to dismiss for failure to state a claim do not contain such findings.<sup>30</sup> We are thus left with the finding that section 21D(c)(1) findings are most likely to appear in cases the parties agreed to ask the court *not* to award sanctions!

## 5. Discussion

This examination of district court (non-) compliance with a mandatory requirement of the PSLRA reveals a number of dimensions along which judicial behavior may deviate from the perfect agent account of judging. Learning or experience with a rule, measured here through exposure to the rule, appears to be an important predictor of compliance. Judicial motivation and the cost of compliance, proxied here in part by senior status and by the risk of appellate discipline, matters as well. On the other hand, judicial ideology has no predictive power in this context.

Notably, the parties and their attorneys seem to play a major role in the patterns of compliance. Given the design of section 21D(c)(1), this should be surprising. The whole point of a mandatory requirement that the court make findings on Rule 11 compliance in every case is, presumably, to take away from the litigants, and even from the judge, the decision of whether to make such findings. But as we noted above, every sanctions rule, whether styled as self-executing or not, relies on either the parties or the court to invoke it in a particular case.

Reliance on the court, we have found, is imperfect. Factors such as judicial experience and exposure to securities cases are correlated with patterns of compliance, despite their utter irrelevance to the rule. But what about the litigants? Why aren't defendants (or plaintiffs, for that matter) consistently demanding such findings?

Reliance on the parties is imperfect as well. (This fact explains the mandatory feature of the statute in the first place; if the parties were perfect agents of Congress in moving for sanctions, the statute would be unnecessary.) Although findings may lead to sanctions, and sanc-

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<sup>29</sup> A representative example of such text is, "The Court finds that during the course of the Litigation, the Parties and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11." Final Judgment and Order of Dismissal with Prejudice, p. 5, *In re Dura Pharmaceuticals, Inc. Securities Litigation*, 99-CV-00151 (S.D. Cal. Dec. 3, 1999).

<sup>30</sup> Manual review (both in and out of the sample used for regression analysis) revealed hundreds of such orders, despite our ability to find only 15 in-sample cases that arguable contained section 21D(c) findings and not involving settlements.

tions potentially yield monetary returns to a party, it is likely a rare case in which a party has incentive to press for findings under section 21D(c)(1). Moving the court to make findings is itself a costly undertaking. There are likely to be few cases in which the monetary returns to seeking sanctions justify seeking sanctions. The rates at which courts issued sanctions prior to the PSLRA were exceedingly low (indeed, section 21D(c)(1) presumably responds to this fact), which suggests that there are few cases in which litigants see it in their self-interest to pursue sanctions. Further, attorneys may be repeat players with the opposing counsel and with the court. Therefore, even when it may be in the interest of a litigant to seek sanctions, the attorneys may not want to do so, lest they antagonize the opposing counsel or the court, who may impose penalties against them in later periods.

We can further explore the incentives of the participants by considering two types of cases. First, consider those cases where a party would find it worthwhile to move for Rule 11 sanctions, or where a filing was so clearly frivolous that, even without the command from the PSLRA, the court would raise the issue of sanctions *sua sponte*. In these cases, a motion will be made or the court will bring the issue up on its own.<sup>31</sup> As such, the statute is unnecessary, since Rule 11, permits parties to make motions and courts to consider sanctions *sua sponte*. We know that such cases were exceedingly rare before the PSLRA, maybe 1 or 2 percent of private securities cases.<sup>32</sup> This scenario would easily account for the 15 out of 1,029 cases in the sample (1.5 percent of cases) where section 21D(c)(1) findings appeared outside of the settlement context.

Second, consider those cases where no party would find it worthwhile to raise a sanctions motion, and the court is unconcerned about a Rule 11 violation. But for the PSLRA, no party would move for Rule 11 findings, nor would the judge raise the issue. To what extent does the PSLRA change behavior? Our findings indicate that the answer is “not that much.” The judge has little incentive to make findings (other than a desire to “follow the law”), given that the parties will not press the issue. So we might predict—consistent with our results based on proxies for effort or motivation—that a judge will do so only when the effort

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<sup>31</sup> The appeals court is also relevant here, since if the participants below do not believe the case is obvious, but the appeals court does, the same result obtains.

<sup>32</sup> A Third Circuit Task Force on Rule 11 found that for one year (1987–1988) out of over 21,000 cases decided, there was Rule 11 activity in only about 120 of them, or about 0.6 percent of cases. Burbank (1989). Our calculations using this data and data from the Administrative Office of U.S. Courts, suggests the use of Rule 11 was more common in securities cases: there was Rule 11 activity in about 1.4 percent of securities cases in the Third Circuit in that year.

involved is minimal. This would be the case if the judge could get by with boilerplate findings.

Further, given that neither party has incentive to demand sanctions, we might expect the issue of findings under section 21D(c)(1) to arise only in situations where someone *else* might seek to intervene in the case, using non-compliance with section 21D(c)(1) as a basis for demanding court action. Such a scenario may actually arise with some frequency in large, complex securities class actions, which usually end in settlements. Here, both the defendant (and its attorneys) and the plaintiffs' attorneys see a settlement in their best interests, but absent class members may feel shortchanged by the settlement, or may wish to use objections to the settlement as a means of obtaining a better outcome for themselves. The parties, therefore, have an incentive to ensure that the settlement proceedings assiduously comply with any rules that could be invoked by objecting class members.

This, we surmise, is why we find the otherwise paradoxical result that not only is section 21D(c)(1) largely ignored by courts, but its required findings are almost exclusively made only in the cases where *neither party* wants the court to award sanctions. As noted above, in all but 15 cases with section 21D(c)(1) findings, the findings appeared as boilerplate in a proposed settlement order that was approved (in most cases, adopted verbatim) by the court.<sup>33</sup>

## 6. Conclusion

The conventional wisdom among practicing securities lawyers was that courts did not comply with section 21D(c)(1), and that therefore it is a worthless law. While our findings support the first claim and we can reject a naïve view that judges automatically “follow the law,” we cannot be sure about the value of the law, since it may be valuable in subtle ways that again reflect the interplay of the incentives of judges, parties, and attorneys.

Section 21D(c)(1) may still be effective because it may force the parties to settle, to settle more quickly, or to lower the settlement returns

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<sup>33</sup> An additional indication that the impetus for inclusion of this boilerplate is the parties and not the court is the fact that occasionally a settlement agreement will include an explicit agreement of the parties not to pursue Rule 11 sanctions but no boilerplate findings of compliance with the PSLRA. These agreements are approved verbatim by the court without the addition of section 78u-4(c) findings—even boilerplate ones. See, e.g., Stipulation of Voluntary Dismissal and Order, *In re Business Objects S.A. Securities Litigation*, 3:04-CV-02401 (N.D. Cal. Sept. 8, 2005); Stipulation and Order of Dismissal with Prejudice, *In re Solutia, Inc. Securities Litigation*, 4:03-CV-03554 (N.D. Cal. Jan. 13, 2005).

for marginal cases. This may be the case, even though we do not observe the statute producing motions for sanctions or court-ordered hearings about sanctions. If parties know that courts will, on the margin, be more likely to consider sanctions, or that the opposing counsel, empowered by the statute,<sup>34</sup> may be more likely to move for sanctions, some marginal claims may be deterred.

Another way that this type of judicial warning can be effective at deterring borderline claims, yet be unobserved in the rates of section 21D(c)(1) compliance, is through the strategic use—by both judges and plaintiffs—of the granting of a motion to dismiss without prejudice. Most plaintiffs in securities actions (and virtually all other actions, for that matter) are granted leave to amend at least once before their complaints are dismissed with prejudice. At this point, the judge may remind the plaintiff of application of Rule 11 to the amended pleading, or the defendants’ attorneys may do so off-the-record. The plaintiff with a borderline complaint now has a way to save himself the risk of sanctions under section 21D(c)(1) and the court the trouble of making the findings: since the order granting the motion to dismiss was without prejudice, the order is not a “final adjudication” within the meaning of section 21D(c)(1), but if the plaintiff does not file amended complaint within the time given for repleading, the case closes. In this way, cases that effectively are dismissals with prejudice slip beyond the seemingly comprehensive scope of the PSLRA.

We therefore cannot say that section 78u-4(c) of the PSLRA is ineffective in achieving the statute’s underlying goal of raising the cost of frivolous securities litigation. What we can say is that the naïve view that judges simply know and then follow the law is unsupported by our data. Instead, the way the courts apply this law is the outcome of a much more complex process, one involving both the courts’ own incentives and those of the parties.

This is not necessarily a bad thing. After all, one might judge the PSLRA misguided insofar as it insists that judges make findings that in most cases neither the parties nor the judge would think are anything more than a waste of time. A collective decision, whether conscious or not, to avoid a pointless exercise seems to be at worst what a judge might, in other contexts, call “harmless error.”

But these results are a reminder that it is not enough for Congress to declare an action an obligation for the action to be undertaken. The obligations have to be designed in ways that speak to the incentives of the actors in the legal system who will undertake the desired action. At least in contexts similar to the one we study here, it may be more

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<sup>34</sup> Pointing to the statute may be a lower cost way of raising the issue of sanctions, since courts or the lawyers can also fall back on the claim that they were just following the law in their pursuit of sanctions.

sensible for Congress to focus legal requirements on the parties instead of judges, since the former appear to be the main drivers of knowledge of and compliance with the law.

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### **Appendix: Appellate Cases**

Bondiatt v. Novell, Inc. 141 F.3d 1184 (10th Cir. 1998) (noting failure of district court to make required findings, but holding that this failure did not make the court's judgment not final and thus not appealable)

*Gurary v. Winehouse*, 190 F.3d 37 (2d Cir. 1999) (“Gurary I”) (remanding to district court to make findings per statutory requirement)

*Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 177-78 (2d Cir. 1999) (affirming grant of sanctions but remanding to the district court to reconsider the amount of sanctions appropriate under the statute given the frivolous findings involved only one claim in a multi-claim action)

*Gurary v. Winehouse* (“Gurary II”), 235 F.3d 792 (2d Cir. 2000) (reversing district court and directing imposition of sanctions)

*Smith v. Lenches*, 263 F.3d 972 (9th Cir. 2001) (affirming district court ruling denying defendant’s motion for sanctions)

*Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.*, 6 Fed. Appx. 106 (2d Cir. 2001) (remanding for district court to make findings as per the statute)

*Dellastatious v. Williams*, 242 F.3d 191 (4th Cir. 2001) (denying cross-appeal for sanctions without remand)

*Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182 (11th Cir. 2002) (affirming grant of sanctions but remanding to redetermine amount based on appellate determination that one claim was non-frivolous)

*Professional Management Associates, Inc. v. KPMG LLP*, 345 F.3d 1030 (8th Cir. 2003) (reversing denial of sanctions, and remanding to impose sanctions)

*Hartmarx Corp. v. Abboud*, 326 F.3d 862 (7th Cir. 2003) (reversing district court grant of sanctions pursuant to the statute)

*De La Fuente v. DCI Telecommunications, Inc.*, 82 Fed. Appx. 723 (2d Cir. 2003) (affirming district court’s grant of sanctions)

*Rombach v. Chang*, 355 F.3d 164, 178 (2d Cir. 2004) (remanding where the district court did not make the required statutory findings)

*Morris v. Wachovia Securities, Inc.*, 448 F.3d 268 (4th Cir. 2006) (affirming district court finding of Rule 11 violation, but remanding to impose sanctions as a result, as required by the statute)

*Endovasc, Ltd. v. J.P. Turner & Co., LLC*, 169 Fed. Appx. 665 (2d Cir. 2006) (remanding for more detailed findings by district court; “The dis-

district court's statement that it could not find "that the Complaint was filed for an improper purpose, that it presented a frivolous legal position or completely lacked evidentiary support," does not satisfy the requirements of section 27(c).")

*Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 276 (4th Cir. 2006) ("[T]he Rule 11(b) inquiry is mandatory even if other claims in the action arise under other laws.")

*Lowery v. Blue Steel Releasing, Inc.*, 261 Fed. Appx. 17 (9th Cir. 2007) (affirming district court ruling denying defendant's motion for sanctions)

*Foster v. Wilson*, 504 F.3d 1046 (9th Cir. 2007) (reversing district court award of sanctions on ground lawyers did not have notice and right to defend their actions)

*ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 579 F.3d 143 (2d Cir. 2009) (affirming granting of sanctions by district court, but remanding for determination of whether defendant, who waited to be invited by district court to seek sanctions, unnecessarily delayed sanctions inquiry, thus inflating costs of litigation and thus sanctions award)

*Citibank Global Markets, Inc. v. Rodriguez Santana*, 573 F.3d 17 (2009) (holding that statutory requirement obtains even if all securities claims dismissed on state law grounds, but concluding, without remand, that no sanctions warranted)

*Brunig v. Clark*, 560 F.3d 292 (5th Cir. 2009) (reversing district court award of sanctions on ground lawyers did not have notice and right to defend their actions)

*Kelter v. Associated Financial Group, Inc.*, 382 Fed. Appx., 632 (9th Cir. 2010) (affirming district court ruling denying defendant's motion for sanctions)

*Ledford v. Peeples*, 605 F.3d 871 (11th Cir. 2010) (affirming grant of sanctions but remanding to modify some of the details)

*Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 637–39 and n. 16 (11th Cir. 2010) (remanding for compliance with statutory obligation)

*Libaire v. Kaplan*, 395 Fed. Appx. 732, 736 (2d Cir. 2010) (affirming award of sanctions by district court) (affirming finding that dismissal

for time-barred claims was “final adjudication” triggering mandatory sanction determination)

*Scotto v. Brady*, 410 Fed. Appx. 355 (2d Cir. 2010) (remanding for district court to make findings re compliance with Rule 11)

*Fishoff v. Coty, Inc.*, 634 F.3d 647 (2d Cir. 2011) (affirming district court ruling denying defendant’s motion for sanctions)

*Beleson v. Schwartz*, 419 Fed. Appx. 38 (2d Cir. 2011) (remanding where district court did not make the required statutory findings)

*Kazenercom TOO v. Ibar Development, LLC*, 464 Fed. Appx. 588 (9th Cir. 2011) (reversing order denying sanctions as premature)

*City of Livonia Employees’ Retirement System and Local 295/Local 851, IBT v. Boeing Company*, 711 F.3d 754 (7th Cir. 2013) (remanding for district court to make required findings under statute)

### **Appendix: Compiling the Dataset**

We began with the set of all civil cases filed in federal court from 1994 through 2008, and terminated by December 31, 2012, that are coded as “securities” cases by the Administrative Office of the United States Courts (AO). These cases were drawn from data on all civil cases filed in the federal courts published by the Federal Judicial Center (2005a-d, 2006a-b, 2007, 2009a-b, 2011, 2013). Information on the district, office, and docket number of each case allowed us to uniquely identify these cases on PACER, the web-based interface for accessing federal court filings. The AO data gave us a list of 20,975 docket numbers in securities cases.

We then downloaded the docket sheets for each of these cases. Because we were unable to download docket sheets for some docket numbers, we obtained a total of 20,622 docket sheets from PACER. We then conducted textual analysis of these docket sheets to exclude categories of securities cases that were outside the scope of the PSLRA, such as cases in which the government (most often the Securities and Exchange Commission) was a party or cases that merely involved motion to confirm or vacate an arbitral award in an arbitration between, for example, an investor and a securities broker. We also attempted to remove cases that were simply member cases in consolidated actions. This left us with 14,838 docket sheets.<sup>35</sup>

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<sup>35</sup> To be precise, we exclude cases in which the civil cover sheet lists the jurisdictional basis as “U.S. Government plaintiff” or “U.S. Government defendant”; the case named contained “Securities and Exchange Commission” “SEC”

Each docket sheet contains a series of docket entries, in which each order entered or pleading or motion filed in the case is recorded. Our 14,838 docket sheets contained a total of 818,185 docket entries, and it is this set of docket entries that we searched for ordered that might contain section 21D(c)(1) findings. The first stage of our search for section 21D(c)(1) findings involved the automated text parsing of our database of docket entries.<sup>36</sup> We identified the following categories of documents:

- Judgments;<sup>37</sup>
- Final orders;<sup>38</sup>
- Certain other orders granting dispositive motions;<sup>39</sup>
- Sanctions orders;<sup>40</sup>
- Order approving settlements.<sup>41</sup>

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“CFTC” or “Commodity Futures Trading Commission”; the docket sheet anywhere contained “arbitral” “NASD” or “abitrat!”; or the cover sheet contained “lead case:” “relÂ case:” “related case:” “rel case:” “CONSOL” “MEMBER” “RELTD”. Note that “!” is used in this context to indicate that the preceding string is a word stem; i.e., it represents a wild card of any length of characters.

<sup>36</sup> To streamline processing, before parsing the text as indicated below, we removed all instances of the following terms “copy of” “amended” “clerk!” “revised” “and” “memorandum” “,” “.” “\*”.

<sup>37</sup> The docket entry contained “judgment” or “judgement” in the first 25 characters.

<sup>38</sup> The docket entry began with “opinion” or “order” and the docket entry contains “with prej!” “w prej!” “w/ prej!” “without leave to amend” “w/o leave to amend” “w/out leave to amend” “den!” “leave to amend” or “order of dismissal”.

<sup>39</sup> The docket entry began with “opinion” “order” and the docket entry contained “summary judgment” “SJ” “MSJ” “MTD” or “dismiss!” and the docket entry contained “grant!” (“entry” and “judgment”) (“enter!” and “judgment”) “MTD” (“dismiss!” and “entir!”) “dismissing case” “case is dismissed” or “terminat!” and the docket entry did not contain “w/out prej” “w/o prej” “with leave to amend” “12(b)(2)” or “12b2”.

<sup>40</sup> The docket entry began with “opinion” or “order” and the docket entry contained “Rule 11” “Procedure 11” “Proc 11” “FRCP 11” “P 11” “sanction!” “21D(c)” or “78u!”.

<sup>41</sup> Recall that settlements of certified class actions must be approved by court order. The criteria in this case were that the docket entry began with “opinion” “order” “stipulation and order” “Settlement order” or “agreed order” and the docket entry contained “settle! or “sttl!” or “stlm!” and either “approv! or (“award!” and (“attorney!” or “atty!”) and “fee!”), but not “denied” “deny!” “conf!” “mediation” or “preliminar!”

We then attempted to download the order associated with that docket entry. For many docket sheets, however, especially older ones, the docket entries did not contain working links to PDFs of the underlying order. For docket entries with working links, we downloaded the orders associated with these entries, and these orders formed the set of documents reviewed in the second stage of our automated search.

In this stage, we attempted to search the text of each order for language indicating section 21D(c)(1) findings. We first checked whether the PDF image was text-searchable by searching the image for the word “court” (which should of course appear in every order). Based on this test, we were left with 6,023 orders from 2,150 cases. We then searched these orders for indicia of section 21D(c)(1) findings. If any of the following terms appeared in the document, we flagged the order for manual review:

- “78u-4(c)”
- “Rule 11”
- “Procedure 11”
- “Proc 11”
- “FRCP 11”
- “P 11”
- “sanction!”
- “21D(c)!”

This text parsing yielded 937 orders in 421 cases flagged for manual review. Subsequent manual review determined that there were 317 orders from 229 cases with language at least arguably reflecting section 21D(c)(1) findings. (Perhaps 306 clearly contain findings.)

The fact that only about half of the cases flagged by the automated process in fact had section 21D(c)(1) language reflects the deliberately over-inclusive search terms. As a check for potential *under*-inclusion of orders, we conducted a manual review of over 200 orders that were not flagged, including all 129 orders in the text-searchable set that contained “78u” but not “78u-4(c).” Of these orders *none* contained language even arguably constituting section 21D(c)(1) findings.<sup>42</sup>

To complete the construction of our dataset, we then scraped case information from the docket sheets on each of the cases within the scope of our study for which we had docket sheets. This information included start and end dates for the litigation, the assigned judge’s

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<sup>42</sup> An additional manual review of all text-searchable orders downloaded from PACER for 200 cases revealed only two cases in which section 21D(c)(1) language appeared but was not flagged by the automated search algorithm. This implies an error rate of 1 percent. In both cases, it appears the failure was due to errors in the PDF-to-text conversion.

name, and counts of the numbers of dockets entries and the numbers of mentions of the stem “sanction.” We then merged this data with the data on cases containing section 21D(c)(1) findings and data on which cases had docket sheet hits and which cases had text-searchable orders. Information on judicial characteristics was provided courtesy of Thomas J. Miles, who has constructed a dataset of district judge characteristics for a paper published in this volume.

The final step of processing was to remove the remaining consolidated cases that evaded our earlier screen at the docket-sheet parsing stage. When a judge terminated more than one securities case in a single day, we removed all but one instance of that case. This is to avoid double-counting a single order (and thus a single act of making section 21D(c)(1) findings) that applies to cases with different docket numbers.<sup>43</sup> We then focused on cases in which all of the downloaded documents were text searchable.<sup>44</sup> This left us with 1,039 cases, decided by 454 unique judge-district pairs from 78 districts.<sup>45</sup> For purposes of the analysis herein, these cases are the relevant sample—the set of cases in which we could have found section 21D(c)(1) findings. Of these cases, 140, or 13.5 percent, had section 21D(c)(1) findings.<sup>46</sup> In 125 of the

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<sup>43</sup> Of course, this method may also remove cases coincidentally decided on the same day. Given that our sample period contains over 4 million judge-workdays and fewer than 2,000 orders, such coincidences are likely to be few. In addition to same-day, same-judge cases, five cases were excluded on the grounds that manual revealed they were out of scope, as they involved a governmental plaintiff, arbitration review, or a dismissal on jurisdictional or venue grounds, and 33 cases were excluded because of missing termination date information.

<sup>44</sup> As a robustness check, we also conducted the analysis below using a dataset that included all cases with both text-searchable and non-text-searchable orders. (The results are available from the authors.) This dataset included 1,639 cases and generated summary statistics and regression results very similar to those reported herein, with one exception noted below in section 4.5. It is worth noting that cases with orders that are downloadable and text-searchable are not the norm in the sample period. Out of over 14,000 cases in our initial set of securities cases, only about 2,100 contained working links to text-searchable orders.

<sup>45</sup> In our data, unique judge identifiers correspond to unique district-judge combinations. A small number of judges have two judge identifiers, as they adjudicated cases in two districts. Also, note that these cases with text-searchable orders are not drawn uniformly over time from the underlying set of docket sheets. Unsurprisingly, the prevalence of text-searchable orders among all orders increases over time.

<sup>46</sup> As check on the low incidence of Section 21D(c)(1) findings, we ran a search in Westlaw of all cases citing section 78u-4. This yielded 4,204 opinions. Boolean text searches of these opinions for references to 78u-4(c), Rule 11, or sanctions, yielded 676 hits, and subsequent manual review identified 135

140 cases with the required findings, the findings appeared in a court order approving a settlement. Descriptive statistics for this sample appear in Table 1.

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opinions, or 3.2 percent of the sample, which either arguably made section 21D(c)(1) findings or, if they were interlocutory orders, discussed the court's obligation to do so at the conclusion of the litigation.



**Table 1.** Descriptive Statistics

	Mean	Min	Max
Docket entries <sup>1</sup>	92.9	3	1967
Sanctions mentions <sup>2</sup>	0.78	0	49
Case duration (years)	2.00	0.02 (7 days)	10.81
Termination date	23 Apr. 2007	30 Mar. 1998	10 June 2013
Adjusted ideology	0.006	-0.666	0.731
Class Action	0.831		
Confirmed post-PSLRA	0.511		
Senior status	0.164		
Chief judge	0.106		
Female	0.224		
Black	0.112		
Asian	0.006		
Hispanic	0.045		
After Appellate Ruling: Remand	0.119		
After Appellate Ruling: No Remand	0.091		
Findings	0.135		

<sup>1</sup> This is a skewed distribution; the median number of docket entries is 60.

<sup>2</sup> In 89.0% of cases, the word “sanctions” did not appear in the docket sheet.

**Table 2.** Logit Regression Results, All Variables

	(1)	(2)	(3)	(4)	(5)
Time Since PSLRA	0.018 (0.005)**	0.018 (0.005)**	0.019 (0.006)**	0.019 (0.006)**	0.012 (0.005)*
Past Securities Cases (Judge)	0.005 (0.016)	0.005 (0.016)	0.000 (0.017)	0.000 (0.017)	-0.006 (0.015)
Past Securities Cases (District)	0.027 (0.014)	0.028 (0.014)*	0.029 (0.015)*	0.029 (0.015)*	0.023 (0.014)
Senior Status		-0.063 (0.021)**	-0.055 (0.022)*	-0.056 (0.022)*	-0.045 (0.021)*
Chief Judge		0.018 (0.040)	0.014 (0.040)	0.011 (0.040)	0.015 (0.037)
Confirmed Post-PSLRA		0.001 (0.023)	0.013 (0.025)	0.012 (0.025)	0.014 (0.022)
Ideology Score			0.009 (0.030)	0.009 (0.030)	0.013 (0.027)
Precedent: Remand				0.014 (0.104)	-0.024 (0.068)
Precedent: No Remand				-0.093 (0.033)**	-0.078 (0.032)*
Class Action					0.034 (0.028)
Docket Entries					0.066 (0.012)**
Sanctions Activ- ity					-0.005 (0.012)
Race and Sex Dummies			Y	Y	Y
Circuit Dummies	Y	Y	Y	Y	Y
<i>N</i>	1029	1029	995	995	995

Readers with comments should address them to:

Professor William H.J. Hubbard  
whubbard@uchicago.edu

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